Filed 1/31/19 P. v. LM Connexions, Inc. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA; and CITY OF VALLEJO, Plaintiff and Respondent, v. LM CONNEXIONS, INC., Defendant and Appellant.	A151812 (Solano County Super. Ct. No. FCS048447)

I.

In this nuisance abatement action, the city of Vallejo (City) filed an action against LM Connexions (LMC) alleging violation of local zoning restrictions based on LMC's retail business practice of operating a computer game "skill contest." By way of defense, LMC denied any zoning violation, relying on a broad interpretation of the Vallejo Municipal Code, and in support of its position sought to present oral testimony at a hearing on the City's request for a preliminary injunction. The court rejected LMC's reading of the Vallejo Municipal Code, declined to hear LMC's proffered witness testimony, and granted preliminary injunctive relief. Agreeing with the City that LMC's "skill contest" falls outside the authorized uses for which the property is zoned under the Vallejo Municipal Code, the court ruled that the City had shown a likelihood of prevailing on the merits of a nuisance per se claim and that the balance of harms tipped in its favor. This appeal by LMC is from the issuance of a preliminary injunction. We shall affirm.

II.

A.

LMC began operating around July 2015 as a retail store selling vaping products and other items in the City. LMC's business license allows it to operate an enterprise in which it offers "retail sales of vaping products and calling card products, phone accessories." Under this license, LMC operates a retail business in a strip mall zoned as a Pedestrian Shopping and Service District. Vallejo Municipal Code section 16.24.020 specifies the authorized uses of property zoned as a Pedestrian Shopping and Service District. (Vallejo Mun. Code, § 16.24.020.) Among those authorized is "retail sales: general." (Vallejo Mun. Code, § 16.24.020, subd. (B)(11).) LMC claims it falls within that classification, and thus is not in violation of the zoning ordinance.

Sometime in late 2015, the California Department of Justice began investigating LMC for operating an illegal gambling operation because, in addition to selling vaping products, which was clearly within its license, LMC also sells participation in a computer game, which it calls a "skill contest" and is played for money, at 20 to 30 computer terminals on its premises.

To enter the contest, customers fill out a form and buy credits which are then deposited onto a white account card. The customer sits at one of the computer stations and enters the account number into the computer. The customer must bet credits to play various casino style slot machine games, which they can choose, and credits are won or lost based on performance. To redeem credits and exit the contest, all customers must play one final game, which is played by stopping a cursor that moves back and forth within a rectangle marked with percentage signs. The object of the final game is to stop the cursor at the 100% mark, which carries with it the reward of 100% of the credits stored on the account card. The customer can redeem whatever percentage of purchased credits based on the percentage number the cursor stopped at for money at the cashier. For example, if the customer stops the cursor at 75%, he or she can redeem 75% of the credits stored on the account card at the cashier.

B.

On February 27, 2017, the City filed an ex parte motion for a temporary restraining (TRO) order designed to enjoin LMC from operating its computer contest. The City based its request for injunctive relief on Vallejo Municipal Code section 1.12.020, subdivision (A), which provides for injunctive relief for any uses of property that violate zoning laws. It argued that LMC's computer contest violated local zoning restrictions. The trial judge, Judge Michael Mattice, denied the restraining order but issued an order to show cause why a preliminary injunction should not issue, and set the matter for a preliminary injunction hearing. The City provided affidavits from police officers and planning officials as evidence of the zoning violation.

The City's TRO request was heard March 14, 2017. In a March 14 filing ahead of the TRO hearing, LMC requested leave to bring in the City's witnesses to testify and be cross-examined by LMC's attorneys. At the TRO hearing, Judge Mattice denied LMC's request but said that he might accept some cross-examination or counter declarations at the preliminary injunction hearing.

The preliminary injunction hearing took place April 11, 2017. The City relied on affidavits from police officers and planning officials to prove up a zoning violation, as it had at the TRO hearing. Arguing that this showing was uncontested, the City took the position that LMC should not be allowed to present oral testimony because it had not provided a written statement under California Rules of Court, rule 3.1306 (Rule 3.1306), which requires advance written disclosure of the nature and extent of oral testimony proposed to be introduced.

Judge Mattice declined to entertain testimony from any witnesses at the preliminary injunction hearing. He did, however, allow LMC to place the reasons it claimed it should be allowed to present witnesses on the record. LMC explained that, after Judge Mattice denied LMC's request to present oral testimony at the TRO hearing, a lengthy discussion ensued, during which LMC specifically indicated to the court its intention to present oral testimony at the preliminary injunction hearing. LMC tried to argue it had complied with Rule 3.1306 based on its declared intention at the TRO stage.

After hearing from both parties, Judge Mattice denied LMC's verbal request to present oral testimony at the preliminary injunction hearing. He stated that he could not recall exactly what he said at the TRO hearing, but he did not remember waiving compliance with Rule 3.1306. As a result, and because LMC was not in compliance with Rule 3.1306, the judge sustained the City's objection and the hearing took place without oral testimony. Following the hearing, the City's request for a preliminary injunction was granted on April 20, 2017.

This timely appeal followed.

III.

LMC appeals from the issuance of the preliminary injunction on the grounds that the trial judge erred in interpreting Vallejo Municipal Code sections 16.04.031, subdivision (B) and 16.06.460. Specifically, LMC argues that the trial judge (1) gave too cramped a reading of "retail sales" permitted by Vallejo Municipal Code section 16.06.460, thus excluding LMC's "skill contest" as a permitted use under Vallejo Municipal Code section 16.24.020, and (2) too broadly construed the term "amusement machine" as defined under Vallejo Municipal Code section 16.04.031, subdivision (B) in deciding that LMC needed a major use permit under Vallejo Municipal Code section 16.82.060, subdivision (A)(1) to operate its computer games as an "amusement arcade." Because the trial court incorrectly interpreted these key provisions, LMC argues, it erred in finding that the City would likely prevail on the merits. As a second line of argument, presented both independently and in the alternative as a basis for reversal, LMC contends that the court erred procedurally by disallowing its proffered witness testimony at the preliminary injunction hearing. We disagree on both points.

A.

Familiar principles govern the issuance of a preliminary injunction and the standard of review upon the appeal of one. A court must weigh two factors when deciding whether to issue a preliminary injunction: (1) the likelihood the moving party will prevail on the merits; and (2) the interim harm to both parties resulting from the issuance or non-issuance of the preliminary injunction. (*Butt v. State of California*

(1992) 4 Cal.4th 668, 677–678.) Generally, we review the application of this two-pronged balancing test for abuse of discretion, but when either prong turns on a point of law, we review that point de novo. (*City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1085.) The applicable principles of construction governing the proper interpretation of the Vallejo Municipal Code—a matter of law which we decide without deference—are equally familiar. We first consider the words of the enactment, and if those words, plainly read, are unambiguous, we go no further. (*People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1159.) Only upon a determination of ambiguity do we take into account broader considerations, such as context, structure of the enactment, and legislative purpose. (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1014.)

B.

Of the two zoning and permit issues LMC presents for appeal, we need only reach the "retail sales: general" issue, for if LMC's "skill contest" falls outside that classification, it violates the City's zoning ordinance and for that reason alone constitutes a public nuisance. We conclude it does fall outside the "retail sales: general" classification and that the trial court therefore correctly determined the City was likely to prevail on the merits.

Vallejo Municipal Code section 16.06.460 defines retail sales and creates three categories of retail sales: general, swap meets, and adult uses.[1] (Vallejo Mun. Code, § 16.06.460.) Only businesses engaged in retail sales: general are permitted in Pedestrian

[1] Although retail sales have three categories, the categories of swap meets and adult uses are not relevant to this appeal as the plain language of the two categories does not apply to LMC's game contest. Swap meets are defined as "the display, exchange, barter or sale of new or used common household items or office equipment and furnishings, provided that such activity is carried on in a swap lot." (Vallejo Mun. Code, § 16.06.460, subd. (B).) Adult uses is defined as "[t]he retail sale or rental, from the premises, of goods and merchandise for adult use as defined and regulated by Chapter 16.59." (Vallejo Mun. Code, § 16.06.460, subd. (C).)

Shopping and Service Districts. (Vallejo Mun. Code, § 16.24.020, subd. (B).) Retail sales are defined as "places of business primarily engaged in the sale of commonly used goods and merchandise. . . ." (Vallejo Mun. Code, § 16.06.460.) General retail sales are "[t]he retail sale or rental, from the premises, of goods and merchandise for personal or household use, but excluding[2] those uses listed above. Typical uses include department stores, apparel stores or furniture stores." (Vallejo Mun. Code, § 16.06.460, subd. (A).)

LMC contends that Vallejo Municipal Code section 16.06.460, subdivision (A), should be broadly interpreted and that the trial court erred in narrowly interpreting "rental," excluding LMC's game contest from the "retail sales: general" category because LMC's business is renting computer time and selling entry into the "skill contest." But to discern the meaning of the language LMC relies upon, one must read on. What LMC overlooks is that, to be classified as a "rental" or "retail sale," the goods or merchandise in question must be taken "from the premises." (Vallejo Mun. Code, § 16.06.460, subd. (A).) Renting computer time to play a game stored on a desktop computer inside the premises of LMC does not fall within the plain meaning of "retail sales: general," in this sense. The customer cannot take the game or the computer home for personal use and then later return it.

At oral argument, LMC pointed to other uses, such as laundromats and libraries that it says involve "renting" or use of "goods and merchandise" on site. These examples, LMC contends, demonstrate that the more natural reading of the "from the premises" language in Vallejo Municipal Code section 16.06.460, subdivision (A), is that it is meant to capture *transactions done with* the business or facility involved, not to denote the physical act of carrying something away. The argument is plausible but seems

[2] Retail sales under Vallejo Municipal Code section 16.06.460 specifically excludes "those classified as agricultural supplies and services, animal sales and services, automotive and equipment, business equipment sales and services, food and beverage retail sales and gasoline sales. This use type also excludes retail sales of marijuana." (Vallejo Mun. Code, § 16.06.460.)

strained when the text of the provision is considered as a whole, bearing in mind the examples used in Vallejo Municipal Code section 16.06.460, subdivision (A)—department stores, apparel stores or furniture stores, all of which involve businesses that offer "goods and merchandise" acquired at and carried away from a store location. LMC's computer terminals do not generically fall into that class of businesses. In addition, one of the uses LMC relies upon for this line of argument—libraries—is specifically classified as a "civic" use and thus has its own category. (Vallejo Mun. Code, § 16.24.020, subd. (A)(4).) The City came up with its own examples to use by analogy, pointing to pool halls and bowling lanes as uses that are more closely akin to LMC's "skill contest" than are libraries. These uses would fall within the Participant Sports and Recreation Use classification, Vallejo Municipal Code section 16.06.420, which requires a major use permit. (Vallejo Mun. Code, § 16.24.040, subd. (b)(5).)

We think the City has the better argument here. At worst for the City, the language of its "retail sales: general" classification presents an ambiguity. In resolving that ambiguity, we may defer to the City's interpretation of its own zoning code in our independent review of the meaning or application of the law. (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091.) This rule of construction is particularly apt here, we think, because LMC's "skill contest" appears to be the product of new technology and as a result does not fit perfectly into the existing schema of uses in the City's zoning code. While LMC's proposed construction has some surface appeal, it could constrain the City's ability to regulate newly emergent uses of land within its borders, effectively requiring frequent amendment of the code to deal with uses that were not anticipated when the zoning code was originally drafted. In these circumstances, the doctrine of deference to a public entity's practical construction makes particularly good sense. LMC's attempt to argue the opposite—that the City's practical construction actually favors it, because that City has renewed its business license from time to time—is simply not persuasive.

Accordingly, we agree with the trial court that the City demonstrated a likelihood of prevailing on the merits, thus satisfying the first prong of the preliminary injunction

test. Public harm is presumed in a case, such as this one, "[w]here a legislative body has enacted a statutory provision proscribing a certain activity, it has already determined that such activity is contrary to the public interest." (*IT Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 70.) As we read the record, the balance of harms tips in the City's favor, since zoning violations constitute a public harm under *IT Corporation*. This being a business case, any counterbalancing harm to LMC, assuming there is any, is financial. There is no showing of irreparability. In an affidavit, the President of LMC, Michael Strawbridge, states that LMC has "invested considerable time and money into the computer contest." But beyond that affidavit, LMC provided no evidence of any monetary value irretrievably lost should LMC be enjoined from operating the computer contest. The preliminary injunction also does not require complete closure of the store. LMC is only enjoined from operating the computer contest, not from selling vaping products.

C.

Finally, LMC argues the trial court erred when it did not allow cross examination of the City's declarants at the preliminary injunction hearing under Rule 3.1306. LMC contends it complied with Rule 3.1306 and Judge Mattice found good cause to allow for cross-examination when he stated at the TRO hearing that each party shall have time at the preliminary injunction hearing for cross-examination testimony. By later not allowing LMC to present the cross-examination testimony at the preliminary injunction hearing, LMC contends, Judge Mattice denied it due process. As a general rule, oral testimony is not required on motions, and judges often rule on affidavits alone in that setting. (*Beckett v. Kaynar Manufacturing Co.* (1958) 49 Cal.2d 695, 698, fn. 3.) Courts have the discretion to hear oral testimony at a hearing of a motion which appellate courts overturn only if there is an abuse of that discretion. (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1499.) We see no abuse of discretion here.

Rule 3.1306, does, to be sure, provide for receipt of evidence at a hearing of a motion. "Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders

otherwise for good cause shown." Parties can request to present oral testimony at a law and motion hearing. (Rule 3.1306(b).) But "[p]arties seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced. . . ." (Rule 3.1306(b).)

LMC attempted to persuade Judge Mattice to allow oral testimony at the preliminary injunction hearing, but it failed to comply with Rule 3.1306(b). That, alone, insulates his discretionary decision not to entertain witness testimony from reversal. LMC previewed its intention to present such testimony at the TRO hearing, asking to cross-examine the declarants who provided written declarations in the City's motion for a temporary restraining order. Judge Mattice denied LMC's request for oral testimony at the TRO hearing, while indicating he might allow it at the preliminary injunction hearing. LMC over-reads his receptiveness to considering the matter further at the preliminary injunction stage. That he might does not mean he would. Whatever Judge Mattice said at the TRO hearing, as he explained later at the preliminary injunction hearing, he most definitely did not relieve LMC of its obligation to comply with the disclosure requirements of Rule 3.1306(b).

IV. DISPOSITION

The order granting the preliminary injunction is affirmed.

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Streeter, J.

We concur:

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Pollak, P.J.

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Tucher, J.